No. 17-586

In the Supreme Court of the United States

GREG ABBOTT, Governor of Texas, *et al.*,
Appellants,

v.

SHANNON PEREZ, *et al.*,
Appellees.

On Appeal to the United States District Court for the Western District of Texas

BRIEF FOR LOUISIANA, ALABAMA, MICHIGAN, MISSOURI, OHIO, SOUTH CAROLINA, AND WISCONSIN AS *AMICI CURIAE* SUPPORTING APPELLANTS

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are the States of Louisiana, Alabama, Michigan, Missouri, Ohio, South Carolina, and Wisconsin. The States have a vital interest in the law regarding redistricting, since redistricting is inherently a State function. The District Court's ruling, throwing elections into disarray, has widespread implications for States entering the 2018 election cycle and the coming 2020 redistricting cycle, destabilizing the democratic system in all States. Additionally, the District Court's ruling undermines the ability of States to rely in good faith on the plain language of a District Court opinion.

SUMMARY OF ARGUMENT

The State of Texas has requested that this Court should note probable jurisdiction or summarily reverse the District Court's decision to invalidate *its own* Plan C235. The need to even make this request is remarkable. We agree with Texas's request, as the District Court's decision not only overturns a valid *judicially-drawn* map, but also upends decades of precedent from this Court recognizing States have the primary duty of deciding the political question of district maps and flips the burden to a State to *prove* to

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[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* and its counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, nor made a monetary contribution specifically for the preparation or submission of this brief. The State of Louisiana paid for this brief. *Amici curiae* file this brief with the written consent of all parties, copies of which are on file in the Clerk's Office. All parties received timely notice of *amici curiaes'* intention to file this brief.

a court that the District Court's *own map* contained no intent adverse to the Constitution and the Voting Rights Act ("VRA"). This is, plain and simple, an attack on the fundamental sovereignty of States. Nothing in the VRA establishes any standard by which a State must hold debate on a legislative map, particularly one drawn by a court itself for the express purpose of complying with the laws. Moreover, congressional districts 35 and 27—the remaining congressional districts from the 2011 map—did not violate the VRA as neither was an impermissible gerrymander, nor was it possible to draw an additional majority-minority district in Texas. For the foregoing reasons, this Court should note probable jurisdiction or summarily reverse the District Court's decision.

ARGUMENT

I. THE DISTRICT COURT ERRED BY IMPROPERLY "LOCKING IN" A FINDING OF UNLAWFUL INTENT FROM A 2011 LEGISLATIVE ACT.

The District Court concluded the Texas Legislature possessed a discriminatory purpose in violation of § 2 and the Fourteenth Amendment by furthering the 2013 plan, which had been drawn and ordered to be implemented by that very court.[2] Specifically, the District Court stated that the decision to adopt the 2013 plan was "not an attempt to adopt plans that fully comp'ied with the VRA and the Constitution," but was

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[2] The District Court adopted the same flawed thinking when it reviewed Texas' State districting plan. *See Perez v. Abbott*, No. SA-11-CV-360, 2017 U.S. Dist. LEXIS 136226. *Amici* address this flawed reasoning in *Amici*'s The State of Louisiana, *et al.*, Jurisdictional Statement in *Abbott v. Perez*, No. 17A245 (2017).

merely "a litigation strategy designed to insulate the 2011 or 2013 plans from further challenge, regardless of their legal infirmities." *Perez v. Abbott*, 2017 WL 3495922 *35, 2017 U.S. Dist. LEXIS 129982 (W.D. Tex. Aug. 15, 2017) (hereinafter "Order Overturning Plan C235"). The District Court reached this conclusion by reasoning that the "discriminatory taint" it found present in the 2011 plan had not been removed by enactment of the court's 2013 Plan because "specific portions of the 2011 plans that [it] found to be discriminatory or unconstitutional racial gerrymanders continue unchanged in the 2013 plans" and therefore illegally further existing intentional discrimination. Order Overturning Plan C235 *33, 39.

The District Court's conclusion rests on an improper application of law, circular reasoning, and speculation. The Court glosses over the fact that the 2013 Plan, regardless of whether it shares some district lines with the 2011 Plan, was found by *that same court* to expressly comply with the standards set forth in *Perry v. Perez*, 565 U.S. 388 (2012), § 2, and the Fourteenth Amendment. *Perez v. Perry*, 891 F. Supp. 2d 808 (W.D. Tex. 2012) (hereinafter "Order Adopting Plan C235"). In drawing and ordering the adoption of the 2013 Plan the District Court went to great lengths to emphasize that it was aware of the guidance set forth by Supreme Court's ruling in *Perry v. Perez*, 565 U.S. 388 (2012), and that the plan complied therewith. Order Adopting Plan C235 at 816.

In accordance with this guidance, the District Court independently reviewed "as much of the record as possible," concluded the 2013 Plan resolved the § 5 claims and that "no § 2 or Fourteenth Amendment

claims preclude[d] its acceptance," and ordered the Legislature to adopt it. Order Adopting Plan C235 at 825. This represents a careful expression by the Court that it drew a plan free from the legal defects present in the 2011 Plan.

This is not an instance where a legislature intentionally adopted a plan which has an invidious purpose, as the District Court indicates. The Legislature has not reenacted an intentionally discriminatory plan. Rather, the Legislature merely adopted a plan that was judicially drawn and judicially approved as constitutional and free from discriminatory intent. It follows that for the Legislature to be furthering preexisting intentional discrimination, *the District Court itself* would have to possess discriminatory intent in drawing and approving the plan, despite its clear statement that the plan was designed to eliminate any underlying legal defects. Indeed, a court-drawn map, such as the 2013 Plan, is subject to a far higher standard than one drawn by a legislature. *See, e.g.*, *Wise v. Lipscomb*, 437 U.S. 535, 541 (1978) (noting that courts lack "political authoritativeness" and must act "in a manner free from any taint of arbitrariness or discrimination" in drawing remedial districts) (quoting *Connor v. Finch*, 431 U.S. 408, 417 (1977)); *Wyche v. Madison Par. Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) ("Many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts."); *Wyche v. Madison Par. Police Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981) (noting that "a court is forbidden to take into account the purely political considerations that might be appropriate for legislative bodies");

Favors v. Cuomo, Docket No. 11–cv–5632, 2012 WL 928216, at *18 (E.D.N.Y. Mar. 12, 2012), *report and recommendation adopted as modified*, No. 11-cv-5632, 2012 WL 928223, at *6 (E.D.N.Y Mar. 19, 2012); *Molina v. Cty. of Orange*, No. 13CV3018, 2013 WL 3039589, at *8 (S.D.N.Y. June 3, 2013), *supplemented*, No. 13CV3018, 2013 WL 3039741 (S.D.N.Y. June 13, 2013), *report and recommendation adopted*, No. 13 CIV. 3018 ER, 2013 WL 3009716 (S.D.N.Y. June 14, 2013); *Larios v. Cox*, 306 F. Supp. 2d 1214, 1218 (N.D. Ga. 2004); *Balderas v. Texas*, No. 6:01CV158, 2001 WL 36403750, at *4 (E.D. Tex. Nov. 14, 2001). The fact that the 2013 Plan may share some lines with the 2011 Plan is of no legal significance because the District Court adopted those lines as its own.

Given the clear, express conclusion of the District Court in 2012, paired with the guidance in *Perry v. Perez*, it was logical for some portions of the 2011 Plan to remain in the 2013 Plan and it was similarly logical for the 2013 Plan to be adopted by the Legislature without change. The discriminatory intent the Court found in the 2011 Plan cannot logically or legally be said to have carried over to the 2013 Plan merely because some portions of the 2011 Plan are encompassed therein. Indeed, the Supreme Court *instructed* the District Court and Legislature to look to the legal portions of the 2011 Plan in building a new plan and the District Court found that the 2013 Plan complied with the Supreme Court's standards. Order Adopting Plan C235 at 838. Simply put, the 2013 Plan is a new plan, untainted by any underlying discriminatory purpose or intent from the 2011 Plan because the District Court's findings and orders in

2012 necessarily removed any "taint." See string cite, *supra* at 4–5.

With the presumption of constitutionality afforded to legislative acts, none of the findings that the District Court makes aid in its conclusion that the Legislature intentionally furthered pre-existing discriminatory purpose in enacting the 2013 Plan. On the contrary, the District Court's findings as to intent serve only to undercut its own conclusions. As the District Court notes, the Legislature adopted the 2013 Plan and, in an apparent effort to avoid further litigation, did not amend it. How could the Legislature wish to avoid further litigation if it was adopting a plan supposedly rife with legal infirmities? The District Court's illogical supposition that the Legislature adopted the 2013 Plan as part of a trial strategy is bizarre but, if true, it should actually stand *against* the proposition that the Legislature was intentionally furthering an existent purposeful discrimination.

If the District Court is allowed to impute the intent of the Legislature when enacting the 2011 Plan onto a different act, the enactment of the Court-ordered 2013 Plan, potential ramifications flow well beyond this case. The District Court's holding essentially stands for the proposition that any legislative enactment once found to have been motivated by what a court deems to be discriminatory intent, can *never* be cured – even when new maps rely upon a court order. If this circular logic stands, it will work extreme unfairness to States by calling into question the finality of judgments. States will never be sure if court orders are valid or reliable and therefore risk years of ongoing litigation. Moreover, such reasoning would require legislatures

similarly situated to scrap existing maps and redraw *all* of their electoral districts. A comprehensive redraw would occur at enormous cost to taxpayers and would slow the legislative process to an unnecessary crawl.

The District Court improperly imputed the finding of unlawful intent from the 2011 Plan onto the 2013 Plan, thereby invalidating the very plan that it drew, approved, and ordered enacted. Plainly stated, the 2013 Plan is a new plan, cleansed of any discriminatory "taint" by the District Court's earlier finding that the plan was free from constitutional violations and violations of the VRA.

II. THE DISTRICT COURT ERRED BY HOLDING THE LEGISLATURE'S DELIBERATIVE PROCESS TO AN UNDEFINED QUALITATIVE OR QUANTITATIVE STANDARD.

The District Court erred by manufacturing new requirements by suggesting the Legislature did not engage in a sufficiently robust deliberative process. *First*, no such deliberative process is required by any federal or state law. *Second*, even if such a process was required, the Legislature fulfilled those requirements by passing *the very map* drawn by the same District Court.

A. The Voting Rights Act and General Principles of Judicial Review Require Judicial Deference to the Decisions of a State Legislature.

In reviewing the actions of a state legislature on any subject, a court should start from a position of deference, rather than suspicion. Here, however, the lower court not only withheld the deference due on the

political question of redistricting, but also failed to give deference *to itself and its precedent*.

Drawing lines for congressional districts is "primarily the duty and responsibility of the State." *See Shelby Co. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (quoting *Perry*, 565 U.S. at 392). "Reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993). Because the "States do not derive their reapportionment authority from the Voting Rights Act, but rather from independent provisions of state and federal law," the federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements. *Voinovich*, 507 U.S. at 156 (internal citations omitted). *See also Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 593 (N.D. Ill. 2011) (refusing to replace a state legislature's enacted plan "with one that inhibits its legitimate objectives while advancing the objectives of the minority political party at the time of redistricting.").

"In any event," the role of the judiciary "is not to determine whether the procedural choices made by the legislature were the best among a range of options, whether the legislative action had to reflect the testimony received at the public hearings, or whether the legislature was required to consider that testimony or input during its redistricting deliberations. [A court's] task, instead, is to determine whether the legislature's actions violated federal law." *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1298 (S.D. Fla. 2002). "The courts, in assessing the sufficiency of a challenge to a

districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995). Only when race is the "predominant factor motivating the legislature's redistricting decision" will strict scrutiny apply. *Bush v. Vera*, 517 U.S. 952, 959 (1996).

This series of specific limits as to federal court oversight on redistricting plans should be applied to this case without further explanation. However, even on matters of policy and fact-finding generally, this Court has also long extended significant deference to state legislatures. "States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.'" *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456,463-64 (1981) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979) and citing *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952) and *Henderson Co. v. Thompson*, 300 U.S. 258, 264-65 (1937)). So long as there is "evidence before the legislature reasonably supporting the classification," a duly enacted piece of legislation should not be invalidated even if a challenger could "tender[] evidence in court that the legislature was mistaken" *Id; see also* Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, Faculty Scholarship, Paper 74 (2005), *available at* http://scholarship.law.upenn.edu/faculty_scholarship/74. Based solely on the plain language of the District Court in the Order Adopting Plan C235, the

Legislature had ample evidence to suggest the plan fully complied with all requirements of the Constitution and the VRA.

B. Even If Some Deliberative Process Is Required, the Legislature Fulfilled Those Requirements by Passing the Court-drawn District Map.

Attempting to apply a time- or quality-based "deliberation" standard pursuant to which a state legislature must consider district maps is inherently flawed.

First, the legislative process is inherently "deliberative," and it is *highly* irregular for a federal district court to measure the *amount* of deliberation within an inherently deliberative process. Texas, like most states, follows a legislative process dictated by its state constitution and House and Senate rules. In the absence of some alleged violation of that process, no known precedent supports measuring how long or how deeply a legislature "deliberates" on matters it passes. The District Court's ruling implies some greater duty exists to "deliberate" beyond that required by the State's constitution, but even more disturbingly that a federal court can *measure* it.

Some state legislatures are full-time and some are part-time. Some have aggressive policy agendas based on a newly-elected governor or party flip in the majority, and some have the stability of a multi-term governor or decades of single-party control. Not only is such a duty vague and unfounded in law or the Constitution, it would be in abject violation of this Court's holdings in *Northwest Austin Mun. Util. Dist.*

No. One v. Holder, 557 U.S. 193, 203 (2009) describing a "fundamental principle of equal sovereignty" among the States. This Court cannot impose one-size-fits-all requirements on a multitude of sovereign states.

III. THE DISTRICT COURT RULING EVISCERATES THE PRESUMPTIONS OF CONSTITUTIONALITY AND GOOD FAITH.

The Court should note jurisdiction or summarily reverse on the basis that it failed to apply this Court's well-established principle of the presumption of good faith accorded to legislative enactments and the District Court's further failure to exercise extraordinary caution. Instead of applying or even acknowledging the long-standing principle that "the presumption of good faith that must be accorded legislative enactments," *Miller v. Johnson*, 515 U.S. 900, 916 (1995), the District Court, in further failing to "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race," instead chose to declare Plan C235 unlawful by applying a presumption of invalidity when the Texas Legislature acted on the basis of the District Court's own ruling. This presumption means that plaintiffs, not the legislature, bear the "demanding" burden of showing impermissible motivation behind the legislative enactment at issue; any doubt or failure on plaintiffs' part to do so must be resolved in favor of the state. *Id.*

The District Court completely eviscerated the presumption of good faith when it decided that the State's action was unconstitutional. This leaves nothing left of the long-standing presumption of validity afforded to state legislative enactments and

usurps one of the most basic political functions of state legislatures. Following the District Court's logic, the federal judiciary may replace any duly enacted reapportionment plan without regard for the discretion and judgment used by a state in balancing the many intricate factors that go into such a fundamental democratic practice.

The implications are enormous. If the District Court's ruling is permitted to stand, there is nothing left to bar the federal judiciary's "serious intrusion on the most vital of local functions," *Miller v. Johnson*, 515 U.S. 900, 915 (1995), and likewise, nothing left of the mandate that federal courts must "exercise extraordinary caution" in redistricting cases and afford states a presumption of constitutionality and good faith. *Miller*, 515 U.S. at 916. Time and again this Court has similarly held that where legitimate motives exist, government action is presumed valid and a court may not automatically infer an unlawful purpose. *See, e.g., U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990) (beginning the inquiry by "noting the heavy presumption of constitutionality to which a carefully considered decision of a coequal and representative branch of our Government is entitled."); *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (refraining from inferring discriminatory purpose on the part of the state where the state had legitimate reasons to adopt and maintain capital punishment); *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) (presumption of regularity and proper discharge of official duties absent clear evidence to the contrary); *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918) (good faith and validity of actions presumed).

What is truly extraordinary is that the District Court wholly failed to acknowledge *its own reasoning and analysis* in support of the validity of Plan C235 as a good faith basis for Texas' 2013 enactment and implementation of the Plan. In so doing, the Court repudiates its own findings and the lawfulness of its own order. Even without additional justification, the simple fact of the matter is that when the Court entered an order directing Texas to adopt Plan C235, this order alone constituted a legitimate, good faith basis for the enactment of the legislation. The record is absent of any basis on which to infer that the 2013 Legislature had an improper purpose in adopting the Plan. Under a proper application of this Court's precedent and the presumption of good faith and constitutionality, the District Court's ruling must be overturned.

The Legislature's cautious approach in adopting the most obvious path forward to end the litigation was to adopt what the District Court had already found to be a valid remedy, which included both district lines that were altered as well as district lines that the Court found no basis to change. With the normal presumption of validity disemboweled, the District Court found the State action of relying upon the constitutionality of the District Court's own order unconstitutional. This constitutes clear legal error.

The District Court further erred when it applied the *Arlington Heights* factors, as the foundation for the "official action" of the state is the official action of the District Court itself. *See Cooper v. Harris*, 137 S. Ct. 1455, 1479-80 (2017) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)

(standards offered "a varied and non-exhaustive list of 'subjects' of proper inquiry in determining whether racially discriminatory intent existed'" while also reaffirming that the Court has "often held" the burden of proof on the plaintiff to prove race, not politics, "is demanding."(citations omitted)). Despite the legislature basing its action on the valid remedy of the District Court, the District Court still faulted it with a finding of discriminatory intent. The historical background of the action, the specific sequence of events leading up to the action, and the legislative history of the action all can be directly traced to the action of the District Court itself. *Cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68. A legislature adopting a federal District Court plan as its own is hardly a substantive departure from the norm. *See id.*

The *Arlington Heights* framework guides how federal courts should go about finding whether a governmental entity acted with discriminatory purpose. Nowhere within that framework is there a blank check for federal courts to arbitrarily find constitutional violations on the sole basis that they disagree with states' chosen policies and internal democratic processes. *Arlington Heights* states that, while the impact of the official action may provide "an important starting point," impact alone "is not determinative and the court must look to other evidence." *Id.* at 266. Particularly, "the specific sequence of events leading up to the challenged decision also may shed light on the decisionmaker's purposes." *Id.* at 267 (citations omitted). The District Court here struck *four* different state legislative

actions,[3] including the extraordinary measure of the Legislature's acquiescence to Plan C235 *precisely as drawn by the District Court*. For the District Court, there was apparently nothing the Texas legislature could do to remedy the alleged violations. If a District Court can hold a state legislature acted unconstitutionally in adopting a court-drawn plan, there is absolutely nothing stopping other federal courts from inserting themselves into state deliberative processes and holding states hostage to this type of litigation in perpetuity. The precedent established by the District Court, that the judiciary can hold a state in such a damned-if-you-do damned-if-you-don't situation, is a wholly inappropriate overreach by the judiciary into the realm of state sovereign interests. This Court has held that "reapportionment is primarily the duty and responsibility of the State," *Chapman v. Meier*, 420 U.S. 1, 27 (1975), and "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *Miller*, 515 U.S. at 915. The presumption of good faith carries particular weight in the context of redistricting legislation, and yet Texas was plainly not afforded such a presumption. This Court must refuse to allow the District Court its exercise of such unlimited discretion, particularly in this case affecting the most vital of state functions, and which profoundly implicate state sovereign interests

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[3] The House plan enacted in the regular session in 2011; the congressional plan enacted in the special session in 2011; the adoption in the 2013 special session of Plan C235 *as drawn by the District Court*; and, most recently, the adoption in 2013 of virtually all of the 2012 district-court-imposed map for the Texas State House of Representatives.

and their individual citizens' interests in representative democracy.

IV. THE DISTRICT COURT ERRED BY HOLDING THAT DISTRICT 35 IS A RACIAL GERRYMANDER.

A. The District Court Erred in Finding That Congressional District 35 Is an Impermissible Racial Gerrymander by Making Factual and Legal Determinations Based on an Analysis of Counties Rather than Districts.

The District Court further erred by engaging in a county-by-county analysis. In its Order Overturning Plan C235, the District Court found that "Nueces County Hispanic vote[r]s[sic] were deprived of their opportunity to elect candidates of their choice" and that additionally "Travis County does not have Anglo bloc voting and thus does not meet the third *Gingles* precondition." J.S. App. 110a. This county-by-county style analysis is a fundamentally incorrect application of *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), and this Court's further precedent. For *any* analysis to be sound under the VRA it must be conducted using the "*district as a whole*" and not any other political subdivision as the basis for study. *See Bethune-Hill* v. *Va. State Bd. Of Elections*, 137 S. Ct. 788, 800 (2017) (emphasis added).

Despite the clarity of the law, the District Court proceeded to examine and compare residents of two different counties without analyzing the congressional district they reside in as a whole. This Court clearly laid out the "three threshold conditions" in determining improper vote dilution under § 2 of the VRA. *Cooper*,

137 S. Ct. at 1470; *see also Gingles*, 478 U.S. at 50-51. The Court in *Cooper* explained that: "First, a 'minority group' must be 'sufficiently large and geographically compact to constitute a majority' in some reasonably configured *legislative district*. Second, the minority group must be 'politically cohesive.' And third, a district's white majority must 'vote sufficiently as a bloc' to usually 'defeat the minority's preferred candidate.'" *Cooper*, 137 S. Ct. at 1470 (emphasis added) (citing and quoting *Gingles*, 478 U.S. at 50-51) (internal citations omitted).

Fundamentally, the purpose of the three *Gingles* preconditions is to show that "'the minority [group] has the potential to elect a representative of its own choice' in a possible *district*, but that racially polarized voting prevents it from doing so in the *district* as actually drawn because it is "submerg[ed] in a larger white voting population.'" *Id.* (emphasis added) (citing and quoting *Growe v. Emison*, 507 U.S. 25, 40 (1993)). In fact, the long and winding history of VRA legislation focuses on the *district as a whole*. *See Bethune-Hill*, 37 S. Ct. at 800 (2017) ("The ultimate object of the [Voting Rights Act] inquiry, however, is the legislature's predominant motive for the design of the *district as a whole*.") (emphasis added); *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) ("Our *district-specific* language makes sense in light of the nature of the harms that underlie a racial gerrymandering claim.") (emphasis added); *Gingles*, 478 U.S. at 56 ("The amount of white bloc voting that can generally 'minimize or cancel' black voters' ability to elect representatives of their choice . . . will vary from *district to district* . . . .") (emphasis added) (internal citations omitted); *see generally Vera*, 517 U.S. at 952

(1996); *Shaw v. Reno*, 509 U.S. 630 (1993); *Hunt v. Cromartie*, 526 U.S. 541, 551-52 (1999). Therefore, this Court should note jurisdiction or summarily reverse because the District Court erred in its analysis of CD35.

B. The State Was Required to Draw a Majority-Minority District in the I-35 Corridor Due to Extensive Population Growth in That Area.

The State acted properly when it drew CD35 where it did so as a majority-minority district.[4] This Court in *Bethune-Hill* said:

> When a State justifies the predominant use of race in redistricting on the basis of the need to comply with the Voting Rights Act, "the narrow tailoring requirement insists only that the legislature have *a strong basis in evidence* in support of the (race-based) choice that it has made." That standard does not require the State to show that its action was "actually . . . necessary" to avoid a statutory violation, so that, but for its use of race, the State would have lost in court. Rather, the requisite strong basis in evidence exists when the legislature has "*good reasons to believe*" it must use race in order to satisfy the Voting Rights Act, "even if a court

[4] It is important to note that the 2011 map is not properly before the Court because that map is moot. This argument assumes *arguendo* that the 2011 map *is* properly before the Court; however, under any analysis, the District Court was incorrect to find that CD35 is a racial gerrymander.

> does not find that the actions were necessary for statutory compliance."

Bethune-Hill, 137 S. Ct. at 801 (emphasis added) (internal citations omitted) (quoting *Ala. Legis. Black Caucus*, 135 S. Ct. at 1274 (2015)). It can hardly be said that the State did not have a "*strong basis in evidence*" or "*good reasons to believe*" that a Hispanic opportunity district was necessary in this area.[5] *See Bethune-Hill*, 137 S. Ct. at 801. First, the District Court noted the tremendous increase in population the Austin/San Antonio I-35 corridor has seen.[6] J.S. App. 408a ("It is *undisputed* that much of Texas' overall population growth occurred in Bexar County and Travis County and the areas along the I-35 corridor.") (emphasis added). Second, the District Court "found that seven Latino opportunity districts were required . . . .") J.S. App. 112a. And finally, the fact that the District Court approved CD35 for use on what it terms an "interim"

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[5] An objection is appropriate for State House District HD90, which was adopted and amended due to objections by a Latino American group. *Amici* point the Court to The State of Louisiana, *et al.*, Jurisdictional Statement in *Abbott v. Perez*, No. 17A245 (2017) for a more rigorous analysis.

[6] This is a trend that has shown no signs of slowing. Between the decennial census and 2016 Texas experienced the greatest population increase of any state in the United States. *See* U.S. Census Bureau, American Fact Finder Annual Estimates of the Resident Population (2016) (available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2016_PEPANNRES&src=pt). A significant driver of the population growth in Texas is along the IH-35 corridor from the Austin-Round Rock MSA to the San Antonio-New Braunfels MSA. *See* Office of the State Demographer, Texas Demographic Center: Urban Texas – Part Two (2016) (available at http://demographics.texas.gov/Infographics/2017/UrbanTexasPt2).

basis, J.S. App. at a113, at the very least should be a "*good reason to believe*" that race was a permissible factor in adopting CD35.[7] *See Bethune*-Hill, 137 S. Ct. at 801. Furthermore, there is no basis to believe that CD35 is anything like the map struck down in *LULAC v. Perry*, 548 U.S. 399, 424-25 (2006). The map challenged in *LULAC* stretched from the Texas/Mexico border and wound its way up to Austin, over 300 miles away. *See* Texas Legislative Council, Texas Redistricting: Plan 01374C (2003) (available at http://www.tlc.state.tx.us/redist/pdf/chronology_plans/PLAN01374C.pdf). By comparison, CD35 adjoins two communities that experienced the significant portion of the State's population growth as a whole and are only 80 miles apart. Texas Legislative Council, Texas Redistricting: Plan c235, (2013) (available at http://gis1.tlc.state.tx.us/?PlanHeader=PLANc235). Therefore, for the aforementioned reasons, the District Court erred when it found CD35 was a racial gerrymander.

V. CONGRESSIONAL DISTRICT 27 DID NOT DILUTE MINORITY VOTING STRENGTH BECAUSE IT WAS IMPOSSIBLE FOR THE DISTRICT COURT OR THE TEXAS LEGISLATURE TO DRAW AN ADDITIONAL MAJORITY-MINORITY DISTRICT.

Impermissible vote dilution requires the "effect of diluting minority voting strength." *Shaw*, 509 U.S. at 640. As this Court stated, "a 'minority group' must be 'sufficiently large and geographically compact to constitute a majority' in some reasonably configured

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[7] This assumes, *arguendo*, that the Legislature's approval of the interim map can be properly imputed to the State in the first instance.

legislative district." *Cooper*, 137 S. Ct. at 1470 (emphasis added) (citing and quoting *Gingles*, 478 U.S. at 50-51) (internal citations omitted). "Where an election district could be drawn in which minority voters form a majority but such a district is not drawn . . . then—assuming the other *Gingles* factors are also satisfied—denial of the opportunity to elect a candidate of choice is a present and discernible wrong . . . ." *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009). Consequently, if a district *cannot* be drawn then there can be no wrong. *See Id.* To assert a claim under § 2 the party asserting liability bears the burden of showing that "the minority population in the potential election district is greater than 50 percent." *Id* at 19-20; *see also Gonzalez v. Harris County*, 601 Fed. Appx. 255, 258 (5th Cir. 2015) ("The proposed plan must also encompass a district with a greater-than-50-percent voting-age minority population."). "The question [in *Strickland* is] *quantitative*, how many—not *qualitative*, what kind of people." *Reyes v. City of Farmers Branch Tex.*, 586 F.3d 1019, 1023 (5th Cir. 2009) (emphasis in original).

Here, the Appellees have *never* shown how the State could draw more than the seven compact Hispanic majority-minority districts, which is what the current plan has.[8] *See* J.S. App. 127a-131a. No matter what the State did with Hispanic voters in Nueces County—other than locking in their district—their population is insufficient to create a "greater-than-50-

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[8] The District Court makes the same error in its CD27 analysis as in its CD35 analysis, namely that the a county-by-county study is permitted when making determinations under § 2 of the VRA. *See Amici* of the States of Louisiana, *et al.*, *supra*, at 16-18.

percent voting-age" population. *See Strickland*, 556 U.S. at 19-20; J.S. App. at 113a. Furthermore, the fact that the Appellees failed to carry their burden should end the inquiry resulting in a finding of no vote dilutive effect. *See Strickland*, 556 U.S. at 19-20; *see also Gonzalez*, 601 Fed. Appx. at 258. The District Court itself determined that seven Hispanic opportunity districts were required. J.S. App. at 112a. There is no requirement that the State draw a court's preferred districts, instead "it is the domain of the States, and not the federal courts, to conduct apportionment in the first place." *See Voinovich*, 507 U.S. at 156. Finally, only "[i]f a State has good reason to think that all the '*Gingles* preconditions' are met, then so too it has good reason to believe that §2 requires drawing a majority-minority district." *Cooper*, 137 S. Ct. at 1470 (emphasis added) (citing *Vera*, 517 U.S. at 978 (1996)). The State has two of the best reasons one can imagine for believing that *Gingles* one was not met in this case: 1) CD27 and 35 were adopted with the imprimatur of the District Court, and 2) it is not possible to demonstrate an additional Hispanic opportunity district is required or even possible in Texas. J.S. App. 112a ("The [District] Court found that seven Latino opportunity districts were required. . . ."); J.S. App. a127 ("The Supreme Court ruled that a nearly identical district [to those the Plaintiffs' proposed] in the same location was 'noncompact for §2 purposes.'") (citing *LULAC*, 548 U.S. at 435. Therefore, the District Court erred in finding CD27 impermissibly diluted minority voting strength, and this Court should note jurisdiction or summarily reverse to correct the District Court's error.

CONCLUSION

The United States District Court's decision below to overturn its own map, drawn for the express purpose of complying with the Constitution and the VRA, is as erroneous as it is egregious. In the absence of intervening precedent by this Court that would abrogate its Order Adopting Plan C235, the District Court simply cannot issue an order, cause States and voters to act in reliance on that order, and then simply change its mind on the eve of a deadline to redraw district maps for the 2018 elections. Moreover, the District Court's arbitrary *and suspicious* approach to the Legislature's action stands in blatant disregard to the deference afforded to states on this fundamental question of state sovereignty. Accordingly, *amici curiae* respectfully urge this Court to note probable jurisdiction or summarily reverse the District Court's decision.

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